95-153

(1)

Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

JAIRO LOZANO,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is reasonable for an officer to accept consent to search a vehicle from a non-driver who does not own, and did not borrow or lease the vehicle, despite the presence of an individual with a superior possessory interest.

2. Whether the Government carries the burden of showing that an officer's belief is reasonable, and, if so, whether the burden was met in this case.

3. Whether an officer who receives conflicting statements regarding ownership or possession of a vehicle has a duty to inquire further before accepting a consent to search of doubtful validity.

4. Whether consent to search is voluntary when the individual consenting is in custody, has not been informed of her Miranda rights, and has not been told she has a right to refuse consent.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR ALLOWANCE OF THE WRIT . . . 6

THE REQUISITES FOR A PROPER WAIVER OF THE PROTECTIONS OF THE FOURTH AMENDMENT CONSTITUTE AN IMPORTANT QUESTION OF FEDERAL LAW IN NEED OF CLARIFICATION 6

CONCLUSION 12

APPENDIX

Page

Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit A-1

District Court's Order A-7

Magistrate's Report and Recommendation A-14

TABLE OF AUTHORITIES CITED

Page

CASES CITED

Go-Bart Importing Co. v. United States,
282 U.S. 344 (1931) 6

Gouled v. United States,
255 U.S. 298 (1921) 6

Illinois v. Rodriguez,
497 U.S. 177 (1990) 6, 9, 11

Ker v. State of California,
374 U.S. 23 (1963) 6

Schneckloth v. Bustamonte,
412 U.S. 218 (1973) 6, 11

United States v. Impink, 728 F.2d 1228,
1233 (9th Cir. 1984) 9, 10

United States v. Padron, 657 F. Supp.
840 (D.Del 1987), aff'd
United States v. Rubio,
857 F.2d 1466 (3rd Cir.
1988), cert. denied, 488
U.S. 974 (1985) 9

United States v. Preciado-Robles,
964 F.2d 882 (9th Cir. 1992) 12

United States v. Rosario,
962 F.2d 733 (7th Cir. 1992) 11

United States v. Welch,
4 F.3d 761 (9th Cir. 1993) 8

United States v. Whitfield, 939 F.2d 1071,
1075 (D.C. Cir. 1991) 10

STATUTES CITED

18 U.S.C. § 3231 5

21 U.S.C. § 841(a)(1) 5

28 U.S.C. § 1254(1) 2

Fourth Amendment to the United
States Constitution 2, 6, 7

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The petitioner Jairo Lozano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1995.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit is not published. It is set

out as the appendix, beginning on page A-1.[1] The district court's order is also unreported. It appears in the appendix, beginning on page A-7. The magistrate's report and recommendation, also unpublished, appears in the appendix, beginning on page A-14.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its opinion on April 27, 1995. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition is based, in part, on the Fourth Amendment to the United States Constitution, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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[1] There were no parties to the appeal other than Jairo Lozano and the United States.

STATEMENT OF THE CASE

On January 16, 1993, Jairo Lozano ("Lozano") and his companion, Tambra Di-Lynn Herbin (hereafter "Herbin"), were traveling northbound on Interstate 15 in a pickup truck with Missouri license plates. Lozano, a 30 year old Black Hispanic with a limited understanding of English, had borrowed the truck from a person named Santos. Lozano drove the truck. Herbin, who did not have a driver's license, was in the passenger seat at all times. At approximately 8:30 p.m., 30 to 35 miles north of Las Vegas, Nevada, Lozano noticed a Nevada Highway Patrol car pull up alongside the pickup, and he noticed the officers lean forward and look in the direction of the truck's cab.

The patrol car moved behind the truck and signalled Lozano to stop. Lozano pulled to the side of the highway. One of the officers approached the truck, advised Lozano that he was speeding and asked to see his driver's license and registration. Lozano produced a valid Missouri registration and a valid Texas driver's license. Instead of issuing Lozano a citation for speeding, the officers asked him a few more questions, in English, relating to ownership of the truck. During the evidentiary hearing appealed from, the officer claimed that Lozano, when initially questioned, disclaimed knowledge of the owner's identity and informed the officer that Herbin borrowed the truck. Herbin told the officer she knew only the owner's last name.

Thereupon, the officer instructed Lozano to exit the truck and step to the rear. Herbin, the passenger, was taken toward the front of the vehicle. The officers asked the two

a series of questions, attempting to elicit contradictory answers. While the two were being questioned outside the truck, Herbin told the officers she had no possessory interest in the vehicle whatsoever, and Lozano told the officers that he had borrowed and was operating the truck. Lozano had invited Herbin to join him on the cross-county trip. Although he was on notice that Lozano possessed an interest superior to any Herbin may have had, the officer asked only Herbin for consent to search the truck.[2] Herbin consented. No consent to search the vehicle was ever sought or obtained from Lozano, the driver.

Herbin, at the time she was asked for consent, was guarded by an officer who, at the hearing, testified that he would not have allowed her to leave. Prior to requesting and obtaining consent, no one read Herbin her Miranda rights, nor was she informed of her right to refuse consent to search.

Following Herbin's consent, one of the officers searched the luggage and the cab of the vehicle. The search then extended beyond the cab. The bed of the pick-up was searched, and the rear inspected. While inspecting the rear of the truck, one of the officers noticed a horizontal slit over the rear bumper near the license plate. The officer pried the slit open and forced a dismantled clothes hanger into the opening until he felt a puncture. The officer extracted the hanger and noticed a white powdery substance on the tip. Lozano and Herbin were arrested.

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[2] The officers sought and obtained Lozano's consent to a search of his luggage only.

On February 10, 1993, a grand jury returned a one-count indictment charging Lozano with Possession With Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. § 841(a)(1), giving the district court original jurisdiction under 18 U.S.C. § 3231. Lozano thereafter filed a motion to suppress the evidence, consisting of several bags of cocaine seized during the stop detailed above. A magistrate judge conducted a four day hearing on the motion to suppress, and issued a report and recommendation that Lozano's motion to suppress be denied. After a hearing, the district court issued an order dated June 1, 1993 adopting the magistrate judge's recommendation and denying Lozano's motion to suppress. At the hearing before the district court, Lozano pled guilty to the one-count indictment, but preserved his right to appeal the district court's denial of the motion to suppress.

Lozano appealled the denial of his motion to suppress, arguing that Herbin had no authority to consent, that the officers acted unreasonably in accepting her consent, and that, in any event, Herbin's consent was not voluntary. Lozano further argued that the search of the vehicle was unreasonable because there was no probable cause. The Ninth Circuit, by memorandum order attached as part of the Appendix, found that Herbin validly and voluntarily consented to a search, and never reached the probable cause issue. The Ninth Circuit affirmed Lozano's conviction.

REASONS FOR ALLOWANCE OF THE WRIT

I.

THE REQUISITES FOR A PROPER WAIVER OF THE PROTECTIONS OF THE FOURTH AMENDMENT CONSTITUTE AN IMPORTANT QUESTION OF FEDERAL LAW IN NEED OF CLARIFICATION

The Court has consistently held that Fourth Amendment privacy rights are vitally important, and must always be respected. In Ker v. State of California, 374 U.S. 23 (1963), the Court held that "[i]mplicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom." Rights under the Fourth Amendment have been declared, "indispensible to the 'full enjoyment of personal security, personal liberty and private property," and are "regarded as of the very essence of constitutional liberty." Gouled v. United States, 255 U.S. 298, 304 (1921). "The [Fourth] Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931).

It is clear that searches conducted with valid consent do not implicate the Fourth Amendment. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). It is equally clear that the Fourth Amendment is not violated when police officers reasonably believe they have valid consent, even when they do not. Illinois v. Rodriguez, 497 U.S. 177 (1990). However, if the Fourth Amendment's protections are to have

any effect, then the Government must bear the burden of establishing that the officer's belief was indeed reasonable.[3] Constitutional guarantees are affected whenever a court decides whether a consent is valid and voluntary, and whether officers acted reasonably in believing that an invalid consent was valid. Such issues then, constitute important questions of federal law. The facts and decisions in this case demonstrate that these important questions are in need of clarification.

The Ninth Circuit's decision in this case denies Lozano the protections of the Fourth Amendment. It is undisputed that Lozano never consented to a search of the vehicle. Instead, both the district court and the Ninth Circuit found that Herbin, who had no possessory interest in the truck whatsoever, had apparent authority to consent to a search, and on that basis, Lozano's motion to suppress was denied.

There are three decisions in this case. While each decision purports to affirm the one below, there is a discrepancy among them. The district court found that Herbin had joint control over the vehicle and, thus, could validly consent. The magistrate and the Ninth Circuit, on the other hand, did not find that Herbin had joint control. Their decisions rest on the finding that, regardless of Herbin's actual authority to consent, it was reasonable for the officers to rely on Herbin's consent.[4] Since it is unclear

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[3] In the instant case, although the magistrate judge and the Ninth Circuit found that the officers acted reasonably, there is no discussion regarding burdens of proof on this issue.

[4] The magistrate's report and recommendation found that the officers "acted reasonably in determining that Herbin had legal custody

(continued...)

whether Lozano's motion to suppress was denied because Herbin had actual authority or because she had apparent authority, this petition will briefly discuss both issues.

The Government failed to carry its burden of showing that Herbin had joint control over the vehicle, and nothing in the record supports such a finding. See, United States v. Welch, 4 F.3d 761, 764 (9th Cir. 1993) (The Government must present "persuasive evidence of both shared use and joint access to or control over a common area.") (Emphasis in original.) It is undisputed that the owner of the truck, Santos, lent the truck to Lozano alone. While Lozano allowed Herbin to ride with him, the Government never demonstrated that Herbin exercised any control at all over the truck. The Government never demonstrated that Herbin could enter or operate the truck without Lozano's consent. Under these circumstances, Herbin had no authority to validly consent to a search of the truck.

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[4](...continued)
of the truck." See, p. A-18. In contrast, the district court's order found:

> given the facts, Herbin had a common control, or access to the cab of the truck and thus was a proper third-party to consent to the search of the cab of the truck.

See, p. A-11. The Ninth Circuit affirmed, finding that the district court did not err in holding that:

> the police officers who searched Lozano's truck "acted reasonably" by determining that Herbin had legal custody of the truck, and thus found that Herbin had apparent authority to consent to the truck search.

See, p. A-5.

Since Herbin lacked authority to consent, her consent becomes relevant only if the officers acted reasonably in relying on it. Illinois v. Rodriguez, 497 U.S. 177 (1990). The undisputed facts in this case demonstrate that any reliance on Herbin's consent was completely unreasonable. At the very least, the officers had a duty to investigate the circumstances further before accepting Herbin's consent.

During the evidentiary hearing, Herbin testified that she explained to the officer that she had neither custody nor control of the pickup truck. Yet the officer asked for her consent after her disclaimer of any interest. The officer himself testified that prior to the search, Herbin had informed him that Lozano was merely giving her a ride to Missouri. The officer further admitted that after Lozano was taken to the back of the truck, but before the search began, Lozano admitted that he, Lozano, and not Herbin, had borrowed the truck. When an individual with a superior possessory interest is present, a mere passenger has no authority to consent to a search of the entire vehicle. See, United States v. Padron, 657 F. Supp. 840, 847 (D.Del 1987), aff'd United States v. Rubio, 857 F.2d 1466 (3rd Cir. 1988), cert. denied, 488 U.S. 974 (1985). Because prior to commencing the search, the officers knew that Herbin was a mere passenger, and further knew that Lozano was the one who had borrowed the truck, their alleged belief that Herbin had authority to consent was patently unreasonable.

In United States v. Impink, 728 F.2d 1228, 1233-34 (9th Cir. 1984), the court granted a motion to suppress evidence unlawfully obtained, holding:

> At every step of the investigation in this case, a person with a privacy interest superior to Guibault's was present during the search. ...

> We do not hold that police must invariably seek consent from the suspect before relying on a third party's consent. However, when the police intentionally bypass a suspect who is present and known to them to possess a superior privacy interest, the validity of third party consent is less certain.

(Emphasis added.)

Impink further stated, "It hardly bears noting that police may not arrest a suspect solely to prevent his presence at the time consent from a third person is sought." Id. at 1233, n.5. Yet this is exactly what the officers here did when they detained Lozano near the back of the truck, prevented him from communicating with Herbin, and then sought Herbin's consent to search.

If the officers were in doubt as to who had authority to consent to a search of the truck, then, on the facts presented here, they had a duty to inquire further before accepting Herbin's consent. This they failed to do. United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991), held:

> It is the government's burden to establish that a third party had authority to consent to a search. The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to "mutual use" by the persons giving the

> consent, "then warrantless entry is unlawful without further inquiry."

(Citations omitted; emphasis in original.)

Similarly, in Illinois v. Rodriguez, 497 U.S. 177, 188 (1990), this Court indicated that an officer may not always accept a person's consent without further inquiring into that person's authority to consent. An officer's acceptance of consent to search "must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" Id. (citations omitted). If the facts would not lead a reasonable man to conclude that the party had authority to consent, "then warrantless entry without further inquiry is unlawful unless authority actually exists." Id. at 188-89 (emphasis added.) See also, United States v. Rosario, 962 F.2d 733, 738 (7th Cir. 1992) ("in the absence of sufficient facts, officers have a duty to seek further information in order to determine whether they may reasonably infer that the inviter has the necessary authority to consent to an entry or search of the premises").

Assuming arguendo that Herbin had joint control over the truck, her consent to search was still invalid because it was involuntary. Voluntariness depends "on the totality of all the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). Among the factors that should be considered in determining whether consent to search is voluntary are: whether the person was in custody; whether the arresting officer had drawn a gun; whether Miranda rights had been given; whether defendant was told he had a right not to consent; and whether defendant was told that a

search warrant could be obtained. United States v. Preciado-Robles, 964 F.2d 882, 885 (9th Cir. 1992).

Consideration of the Preciado-Robles factors shows Herbin's "consent" was involuntary. Herbin was prevented from leaving the scene, and, thus, was clearly in custody. Moreover, the officers admitted that they neither read Herbin her Miranda rights prior to seeking her consent, nor did they tell her she had a right not to consent to the search.

CONCLUSION

In light of the above, the Ninth Circuit's decision effectively denied Lozano the protections of the Fourth Amendment. The Ninth Circuit, finding that the officers reasonably believed that Herbin validly consented, refused to address whether the search was supported by probable cause. Yet the officers' belief that Herbin had authority to consent was patently unreasonable. Before the search began, Herbin disclaimed any possessory interest in the vehicle. Lozano informed the officers that he, not Herbin, had borrowed the vehicle. Nevertheless, the officers by-passed Lozano and sought consent only from Herbin, without investigating actual authority to consent any further.

Important questions of federal law are presented here. For these reasons, the Court should issue a writ of certiorari,

reverse the Ninth Circuit's decision, and remand the case for a finding on probable cause.

Respectfully submitted,

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